Supreme Court, U.S.
FILED
MAR 2 0 2009
OFFICE OF THE CLERK

No. 08-779

IN THE

Supreme Court of the United States

DAVID C. WITTIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

LISA R. ESKOW
CAROL A. FUNK
ARTHUR C. D'ANDREA
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Ste. 1350
Austin, Texas 78759
(512) 349-1930

STEVEN ALAN REISS
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
I. Mr. Wittig's Petition Provides a Compelling Vehicle to Resolve Enduring Conflicts Among the Courts of Appeals Over Two Important and Unresolved Questions	3
A. The District Court Quadrupled the Maximum Advisory Guidelines Sentence for Mr. Wittig Based on Idiosyncratic Views of This Mine-Run Case	3
B. The Courts of Appeals Conflict Regarding Appellate Review of Idiosyncratic Variances in Mine-Run Cases and the Proper Construction of 18 U.S.C. §3553(a)(6)	5
Conclusion	11

TABLE OF AUTHORITIES

Cases Page

Kimbrough v. *United States*,
___U.S.___, 128 S.Ct. 558 (2007) .....*passim*

Scott v. *Kelly*,
107 F.Supp.2d 706 (ED Va. 2000) 9

Spears v. *United States*,
___U.S.___, 129 S.Ct. 840 (2009)
(*per curiam*) .....*passim*

United States v. *Barron*,
__F.3d__, No. 08-1613, 2009 WL 538382
(CA8 Mar. 5, 2009) 7

United States v. *Boardman*,
528 F.3d 86 (CA1 2008) 8

United States v. *Cavera*,
550 F.3d 180 (CA2 2008) (en banc),
petition for cert. filed (U.S. Feb. 23, 2009)
(No. 08-1081) 5, 6

United States v. *Chotas*,
968 F.2d 1193 (CA11 1992) 10

United States v. *Davila-Rodriguez*,
468 F.3d 1012 (CA7 2006) 10

United States v. *Flanders*,
No. 08-6056, 2009 WL 405846
(CA10 Feb. 19, 2009) 7

United States v. *Friedman*,
554 F.3d 1301 (CA10 2009) 7

United States v. *Funk*,
534 F.3d 522, reh'g en banc granted
and opinion vacated (CA6 Dec. 18, 2008)
(No. 05-3708) 9

TABLE OF AUTHORITIES—CONTINUED

Page

United States v. *Gunter*,
527 F.3d 282 (CA3 2008), petition for cert. filed (U.S. Dec. 23, 2008) (No. 8109) 9

United States v. *Johnson*,
553 F.3d 990 (CA6 2009) 7

United States v. *Levinson*,
543 F.3d 190 (CA3 2008) 9

United States v. *Martin*,
520 F.3d 87 (CA1 2008) 8, 9, 10

United States v. *Ofray-Campos*,
534 F.3d 1 (CA1 2008), cert. denied, 129 S.Ct. 588 (2008), and 129 S.Ct. 999 (2009) 8

United States v. *Omole*,
523 F.3d 691 (CA7 2008) 10

United States v. *Ruff*,
535 F.3d 999 (CA9 2008) 8

United States v. *Smart*,
518 F.3d 800 (CA10 2008) 10

United States v. *Vanvliet*,
542 F.3d 259 (CA1 2008) 8

United States v. *Vidal*,
No. 07-14717, 2008 WL 1875965 (CA11 Apr. 29, 2008).....10

United States v. *Wills*,
476 F.3d 103 (CA2 2007) 10

Statutes and Rules

18 U.S.C. §3553(a) 2, 6

18 U.S.C. §3553(a)(1).....10

TABLE OF AUTHORITIES—CONTINUED

Page

18 U.S.C. §3553(a)(2)(A) 10

18 U.S.C. §3553(a)(6) ..... *passim*

IN THE

Supreme Court of the United States

No. 08-779

DAVID C. WITTIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Mr. Wittig's petition squarely presents the question whether "closer review" is warranted when a district court varies from the Guidelines based on idiosyncratic policy views in a mine-run case. Indeed, that question was the sole subject of the unanimous concurrence to the Tenth Circuit's opinion, with all three panel members also voting in favor of en banc reconsideration of Mr. Wittig's appeal. App. 17a-18a (Hartz, J., concurring); App. 138a. As the United States acknowledges in its brief in opposition, this question was left open by the Court in *Kimbrough* v. *United States*, Br. Opp'n 7 (citing 128 S.Ct. 558, 575

(2007)); and it persists in causing confusion in the courts of appeals, which conflict over the appropriate scope of appellate review in this circumstance. See Pet. 13-21.

The Court's decision this term in *Spears* v. *United States*, ___U.S.___, 129 S.Ct. 840 (2009) (*per curiam*), addressed the permissibility of policy disagreements solely regarding the controversial crack-cocaine ratio and did not, as the United States erroneously suggests, Br. Opp'n 9, resolve the proper scope of appellate review when district judges base sentencing decisions on idiosyncratic views in other types of mine-run cases. See *Spears*, 129 S.Ct., at 843-844.

Nor did *Gall* resolve the conflict over the proper meaning of 18 U.S.C. §3553(a)(6) regarding codefendant sentencing disparities. Br. Opp'n 11-12. The United States fails to address, much less dispute, that, even within courts of appeals that permit consideration of such disparities, some look to distinct subsections of 18 U.S.C. §3553(a), leaving unresolved the proper construction of §3553(a)(6), the subsection invoked by the district court in Mr. Wittig's case and the provision that the Seventh and Eleventh Circuits properly have interpreted as limited to nationwide disparities, not disparities between codefendants.

To resolve confusion among the courts of appeals over both of the important and unresolved federal questions presented, the Court should grant Mr. Wittig's petition.

I. MR. WITTIG'S PETITION PROVIDES A COMPELLING VEHICLE TO RESOLVE ENDURING CONFLICTS AMONG THE COURTS OF APPEALS OVER TWO IMPORTANT AND UNRESOLVED QUESTIONS.

A. The District Court Quadrupled the Maximum Advisory Guidelines Sentence for Mr. Wittig Based on Idiosyncratic Views of This Mine-Run Case.

Contrary to the United States's assertion that the "closer review" issue from *Kimbrough* "is not presented here," Br. Opp'n 7, Mr. Wittig's case provides a compelling vehicle for the Court to resolve this important question. Although the district court recited facts it characterized as "particular" to Mr. Wittig in support of its upward variance, App. 66a, not one "placed petitioner's case outside the mine run of bank fraud cases for which the Guidelines recommended a sentence of 0 to 6 months of imprisonment," Br. Opp'n 7, as the United States erroneously contends.

For example, the United States highlights the district court's reliance on the amount of money involved, $1.5 million, as a factor justifying an increased sentence. Br. Opp'n 8. But this amount cannot render Mr. Wittig an unusually egregious bank-fraud defendant because the $1.5 million extension of his line of credit was fully collateralized, and there was no actual or intended loss. See, *e.g.*, App. 82a; Pet. 6-7, 14. Mr. Wittig's bank-fraud conviction is "uncommon," App. 66a, if anything, for the total absence of risk or loss to the financial institution. Moreover, to the extent the district court found that Mr. Wittig "intended to profit" from the offense, Br. Opp'n 5, that would be typical of

financial-fraud defendants.[1] The district court cited no other aspect of the offense that would place it "outside the mine run of bank fraud cases." Br. Opp'n 7.

The district court did emphasize that Mr. Wittig "has never acknowledged any responsibility," requiring the government to "continually meet its burden of proof." App. 65a; see Br. Opp'n 8. But Mr. Wittig's exercise of his constitutional right to a jury trial and his successful appellate challenges to the district court's sentencing and resentencing errors cannot afford grounds to sentence him to four times the maximum advisory guidelines sentence contemplated for the heartland of bank-fraud defendants. See also App. 103a (noting, in affirming Mr. Wittig's conviction, that "the sufficiency of the evidence against Mr. Wittig presents a close issue"). Nor does the "transfer of assets" highlighted by the United States remove this case from the mine run. Br. Opp'n 8. That independently lawful financial transaction concerned payment of attorneys' fees. See Tr. of Re-Sentencing Hr'g 99-104 (Feb. 5, 2007). It was never concealed but, nonetheless, was deemed to violate financial restrictions in Mr. Wittig's conditions of release, resulting in revocation of his bond.[2] That post-

---

[1] The United States erroneously states that Mr. Wittig "received $97,000 in *profit* on the loan," Br. Opp'n 3 (emphasis added), but that was the gross amount of interest paid to Mr. Wittig by his codefendant based on a rate of 7%. App. 73a. Mr. Wittig's "profit" was far less: the difference between that 7% interest and the 5.39% interest he paid in full to the bank. *Ibid.*

[2] The district court subsequently released Mr. Wittig on bond again following the Tenth Circuit's reversal of the second sentencing decision. App. 7a, n.7. But, following the Tenth Circuit's latest opinion, the district court denied Mr. Wittig's motion to continue his release pending resolution of this petition, and he reported back to prison on January 7, 2009.

conviction, bond-related fact does nothing to place Mr. Wittig or his conviction outside the mine-run of bank-fraud cases.

As the Tenth Circuit panel observed in the unanimous concurrence below, that court's jurisprudence does not permit closer appellate review of variances in mine-run cases and thus cannot ensure that "the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be." App. 18a (Hartz, J., concurring) (advocating reversal when "the sentencing judge has an idiosyncratic view of the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of incarceration in the criminal-justice system"). The question of "closer review" in mine-run cases was thoughtfully analyzed in Mr. Wittig's appeal, in which five judges on the Tenth Circuit voted to rehear the case en banc, including all three panel members. App. 138a. The Court should grant Mr. Wittig's petition to resolve this squarely presented, important question.

B. The Courts of Appeals Conflict Regarding Appellate Review of Idiosyncratic Variances in Mine-Run Cases and the Proper Construction of 18 U.S.C. §3553(a)(6).

Although the United States contends that this Court's recent sentencing decisions have already resolved both questions presented in Mr. Wittig's petition, confusion and conflicts in the courts of appeals endure.[3] Neither *Kimbrough* nor *Spears*

---

[3] On February 23, 2009, a petition for writ of certiorari was filed in *Cavera* v. *United States*, No. 08-1081, seeking review of

determined the permissibility of "closer review" of idiosyncratic sentencing decisions in mine-run cases outside the crack-cocaine context. Br. Opp'n 9. Nor did *Gall* resolve disagreement over the proper construction of 18 U.S.C. §3553(a)(6) as applied to codefendants. Br. Opp'n 11-12. Because both important questions warrant the Court's attention, the Court should grant Mr. Wittig's petition.

Regarding variances, *Spears* confirmed only that district courts may categorically disagree with Sentencing Commission policy regarding the controversial 100:1 ratio for crack and powder cocaine. 129 S.Ct., at 843-844 ("[W]e now clarify that district courts are entitled to reject and vary categorically from the *crack-cocaine Guidelines* based on a policy disagreement with *those* Guidelines." (emphasis added)). Elsewhere, the Court has "preserved a key role for the Sentencing Commission," *Kimbrough*, 128 S.Ct., at 574, leaving open whether "closer review" is appropriate when a district court concludes that Guidelines policy "fails properly to reflect §3553(a) considerations even in a mine-run case." *Id.*, at 575 (internal quotation marks omitted); Br. Opp'n 7. Indeed, the Court noted in *Spears* that in *Kimbrough* "[t]he implication was that an 'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect." 129 U.S., at 843. Accordingly,

---

the Second Circuit's en banc opinion, *United States* v. *Cavera*, 550 F.3d 180 (CA2 2008) (en banc). As noted in Mr. Wittig's petition, Judge Sotomayor's partial dissent in *Cavera* protested the majority's failure to examine the "closer review" contemplated by *Kimbrough*, Pet. 20, n.6, and that issue is raised in Mr. Cavera's petition for writ of certiorari.

some courts have noted that *Spears* did not cabin appellate review of "inside the heartland departure[s]" other than in the crack-cocaine context. *E.g.*, *United States* v. *Barron*, __F.3d__, No. 08-1613, 2009 WL 538382, at *4 (CA8 Mar. 5, 2009) (observing, post-*Spears*, that "[t]he Court has been equivocal about whether . . . closer appellate review is warranted" when the Commission acts in its "characteristic institutional role" (internal quotation marks omitted)); see *United States* v. *Johnson*, 553 F.3d 990, 996 (CA6 2009) (expressing "no opinion on whether the principles articulated in *Spears* may apply outside the crack-cocaine context").

In the Tenth Circuit, however, in which substantive-reasonableness review already has become an "empty gesture," App. 17a (Hartz, J., concurring), *Spears* has been construed broadly: "In a series of ceremonial rites the leveling forces of the guidelines, their hearthstone, were sacrificed on the altar of sentencing discretion and appellate courts rendered impotent." *United States* v. *Flanders*, No. 08-6056, 2009 WL 405846, at *1 (CA10 Feb. 19, 2009) (unpublished) (O'Brien, J., concurring) (cursory affirmance of variance in bank-fraud case).[4]

---

[4] The United States suggests in a footnote that substantive-reasonableness review remains alive in the Tenth Circuit, Br. Opp'n 11, n.2 (citing *United States* v. *Friedman*, 554 F.3d 1301 (CA10 2009)). But *Friedman* involved a downward variance without any discussion or justification by the district court for not treating a "recidivist bank robber" with an "extraordinary record" as a career offender and without any disagreement by the district court with the career-offender guideline on policy grounds. 554 F.3d, at 1308, n.10, 1311 & n.13, 1312. Given that "undeniably sparse record," the Tenth Circuit reversed and remanded without comment on the hypothetical permissibility of a policy disagreement in that case. *Ibid.*

Although the Ninth Circuit, like the Tenth Circuit, treats substantive-reasonableness review as a "rubber-stamp," *United States* v. *Ruff*, 535 F.3d 999, 1005 (CA9 2008) (Gould, J., dissenting), the First, Third, and Sixth Circuits, as the petition established, conduct meaningful appellate review. Pet. 16-21. The United States cites two First Circuit cases it suggests uniformly condone policy disagreements outside the crack-cocaine context, see Br. Opp'n 10, but both involved remands for reconsideration in light of *Kimbrough*, not abdications of appellate review when district courts impose idiosyncratic sentences. *United States* v. *Vanvliet*, 542 F.3d 259, 271 (CA1 2008); *United States* v. *Boardman*, 528 F.3d 86, 87-88 (CA1 2008); see Pet. 17-18. Similarly, although the United States contends that *United States* v. *Ofray-Campos* "said nothing about the permissibility of a variance based on a disagreement with Guidelines policy," Br. Opp'n 10 (citing 534 F.3d 1 (CA1 2008), cert. denied, 129 S.Ct. 588 (2008), and 129 S.Ct. 999 (2009)), inside-the-heartland variances, such as the "triggerman" variance vacated in *Ofray-Campos*, are "necessarily based on a policy disagreement with the Guidelines," *Spears*, 129 S.Ct., at 843, and they nonetheless receive careful scrutiny in the First Circuit. See 534 F.3d, at 43.

Nor did the First Circuit, in *United States* v. *Martin*, read *Kimbrough* as having "opened the door" to categorical disagreements with the Guidelines in all contexts. See Br. Opp'n 10 (quoting 520 F.3d 87, 96 (CA1 2008)). The very sentence from *Martin* that the United States quotes contemplates guidelines deviations "in an *individual* case." Br. Opp'n 10 (quoting 520 F.3d 87, 96 (CA1 2008) (emphasis added)); see also *Martin*, 520 F.3d, at 96 ("Here the district court grounded the defendant's sentence in

case-specific considerations, which is the accepted practice in the post-*Gall* world." (emphasis added)). *Martin* therefore reflects that circuit's practice of demanding that "the sentencing court ma[k]e plain just how this defendant stood out from the mine-run of criminal defendants" for that is "what matters most." 520 F.3d, at 95.

The Third Circuit, likewise, meaningfully reviews variances in mine-run cases. See Pet. 17-18. Although *Spears* ended the Third Circuit's practice in crack-cocaine cases, 129 S.Ct., at 845 (criticizing *United States* v. *Gunter*, 527 F.3d 282, 286 (CA3 2008), petition for cert. filed (U.S. Dec. 23, 2008) (No. 08-8109)), *Spears* did not, as the United States suggests, "reject[ ]" the holding of *United States* v. *Levinson*, 543 F.3d 190, 199-202 (CA3 2008), Br. Opp'n 10, a case arising outside that context. 129 S.Ct., at 843-844.

Finally, as the United States notes, the Sixth Circuit granted rehearing en banc and vacated its opinion in *United States* v. *Funk*, 534 F.3d 522 (CA6 2008), shortly after Mr. Wittig filed his petition for writ of certiorari. Br. Opp'n 11. The United States did not, however, note that, on March 11, 2009, it moved, unopposed, to dismiss its underlying appeal in *Funk* with prejudice. See Mot. to Dismiss Appeal, *United States* v. *Funk*, No. 05-3708 (CA6 Mar. 11, 2009). If granted, the United States's motion would negate the en banc vehicle for the Sixth Circuit to reconsider its "closer review" of variances in mine-run cases, leaving *Funk*'s reasoning untested. See *Scott* v. *Kelly*, 107 F.Supp.2d 706, 710, n.11 (ED Va. 2000) (treating as "persuasive" panel opinion vacated on granting of rehearing en banc but not decided because appellant withdrew appeal).

Divergent approaches persist in the courts of appeals not only regarding the proper scope of appellate review of variances in mine-run cases, but also regarding the second question presented in Mr. Wittig's petition: the permissibility of considering codefendant sentencing disparities under 18 U.S.C. §3553(a)(6). The United States claims that *Gall* resolved any conflicts on this issue but acknowledges that the Seventh Circuit has stated, post-*Gall*, that §3553(a)(6) applies only to nationwide sentencing disparities, not disparities between codefendants. Br. Opp'n 11-12 (quoting *United States* v. *Omole*, 523 F.3d 691, 700 (CA7 2008)). *Omole*'s holding was not confined by the particulars of the case, Br. Opp'n 12, but reflected that circuit's enduring statutory construction of §3553(a)(6). 523 F.3d, at 700 (citing, *e.g.*, *United States* v. *Davila-Rodriguez*, 468 F.3d 1012, 1014 (CA7 2006)). Similarly, the Eleventh Circuit's post-*Gall* holding in *Vidal* reaffirmed that court's long-standing interpretation of §3553(a)(6) as not encompassing sentencing disparities between codefendants. See *United States* v. *Vidal*, No. 07-14717, 2008 WL 1875965, at *4 (CA11 Apr. 29, 2008) (citing *United States* v. *Chotas*, 968 F.2d 1193, 1197-1198 (CA11 1992)).

The United States also fails to address, much less dispute, that, even within circuits that permit consideration of codefendant disparities, disagreements exist over the source of that authority. Some allow codefendant comparisons under §3553(a)(6) itself, see, *e.g.*, *United States* v. *Smart*, 518 F.3d 800, 804 (CA10 2008); others propose comparisons under §3553(a)(2)(A), see *Martin*, 520 F.3d, at 94; and still others look to §3553(a)(1). *United States* v. *Wills*, 476 F.3d 103, 110 (CA2 2007). Enduring disagreement over the proper construction of §3553(a)(6) is,

therefore, compounded by divergent approaches to codefendant disparities generally, inviting nationwide inconsistencies that warrant the Court's attention.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

LISA R. ESKOW
CAROL A. FUNK
ARTHUR C. D'ANDREA
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Ste. 1350
Austin, Texas 78759
(512) 349-1930

STEVEN ALAN REISS
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Petitioner

March 26, 2009